



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 17 2009

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination – Final Rule Revising the Ozone National Ambient Air Quality Standards

FROM: Patricia K. Hirsch *Patricia K. Hirsch*
Designated Agency Ethics Official
and Principal Deputy General Counsel

TO: Lisa P. Jackson
Administrator

You have asked if you can be permitted to participate in reconsideration of the final rule revising the national ambient air quality standards (NAAQS) for ozone, which this Agency issued in March 2008. Soon after this rule was issued, several States, including New Jersey, petitioned EPA to revise the rule. This litigation related to the March 2008 ozone NAAQS rule is still pending. You therefore also ask if you may participate, if necessary, in that litigation.

As you know, you have a "covered relationship" with the State of New Jersey pursuant to 5 C.F.R. § 2635.502(b)(iv) and have agreed to take appropriate steps to avoid an appearance of a loss of impartiality in the performance of your official EPA duties that pertain to particular matters involving specific parties. Government-wide ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern that a reasonable person may question the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and

(6) the adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

I must first determine whether the reconsideration of the March 2008 ozone NAAQS is a particular matter involving specific parties, thereby triggering the impartiality provisions. The ozone NAAQS standards apply broadly across a wide spectrum, and do not involve any isolatable transaction or set of facts related to a specific party. Therefore, neither the standards themselves nor any reconsideration of the standards presents a specific party matter. You may participate in the reconsideration of the decision.

With regard to the lawsuit, which is a specific party issue, I have carefully considered the six factors that are listed in 5 C.F.R. § 2635.502(d). I have considered the fact that this particular matter involves not just the state of New Jersey but other states as well, and that it involves a nation-wide regulation that is not limited in application to New Jersey or any other single state.

After reviewing all the factors, I have concluded that the interest of the United States Government in your participation in this particular matter would outweigh any concerns about your impartiality. Given the numbers of parties participating in this matter and the national impact of the regulations at issue, I also conclude a reasonable person would have very little concern over the integrity of EPA actions in light of any prior involvement by you on behalf of New Jersey. Therefore, you may participate in discussions and meetings related to the litigation, even though the State of New Jersey is a named specific party. In accordance with your ethics agreement, we understand that you will not participate in any other particular matter that involves the State of New Jersey (or any other of your covered relationships) unless and until you first consult with the Office of General Counsel and obtain a written determination such as this one pursuant to 5 C.F.R. § 2635.502(d).

Please feel free to contact me or Justina Fugh, Senior Counsel for Ethics, if you have any further questions. I can be reached at hirsch.pat@epa.gov or (202) 564-5462; Justina can be reached at fugh.justina@epa.gov or at (202) 564-1786.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 11 2009

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination Regarding State Petitions for Disclosure of
"Inert Ingredients" in Pesticide Products

FROM: Patricia K. Hirsch *Patricia K. Hirsch*
Designated Agency Ethics Official
and Acting General Counsel

TO: Lisa P. Jackson
Administrator

This Agency is contemplating a response to a petition signed by several state attorneys general that requests EPA to require disclosure of "inert ingredients" in pesticide products that have been declared hazardous or potentially hazardous by other EPA statutes. Your former employer, the State of New Jersey, has signed this petition. Consequently, the Office of Prevention, Pesticides and Toxic Substances has asked whether you can be permitted to participate in discussions and any determinations related to the petition.

As you know, you have a "covered relationship" with the State of New Jersey pursuant to 5 C.F.R. § 2635.502(b)(iv) and have agreed to take appropriate steps to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. Government-wide ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern that a reasonable person may question the "integrity of the agency's programs and operations." 5 C.F.R. 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and

(6) the adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

With regard to these specific party matters, I have carefully considered the six factors that are listed in 5 C.F.R. § 2635.502(d). I have considered the fact that this particular matter involves not just the state of New Jersey but other states as well, and that it involves a nation-wide issue that is not limited in application to New Jersey or any other single state.

After reviewing all the factors, I have concluded that the interest of the United States Government in your participation in this particular matter would outweigh any concerns about your impartiality. Given the numbers of parties participating and the national impact of the regulations at issue, I also conclude a reasonable person would have very little concern over the integrity of EPA actions if you are permitted to participate in the petition. Therefore, you may participate in discussions and meetings related to this petition.

In accordance with your ethics agreement, we understand that you will not participate in any other particular matter that involves the State of New Jersey (or any other of your covered relationships) unless and until you first consult with the Office of General Counsel and obtain a written determination such as this one pursuant to 5 C.F.R. § 2635.502(d).

Please feel free to contact me or Justina Fugh, Senior Counsel for Ethics, if you have any further questions. I can be reached at hirsch.pat@epa.gov or (202) 564-5462; Justina can be reached at fugh.justina@epa.gov or at (202) 564-1786.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR -5 2009

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Ethics Determination Regarding Participation in Coal Mining Issues

FROM: Patricia K. Hirsch *Patricia K. Hirsch*
Designated Agency Ethics Official and
Acting General Counsel

TO: Lisa P. Jackson
Administrator

You have asked OGC whether you may participate in particular matters regarding coal and hard rock mining, including specific party issues related to mountain top removal and a recent 4th Circuit decision, and the "Stream Buffer Zone" rule and litigation. You do not own coal mining interests directly, but do own stock in Bank of America, a financial services company that has a demonstrated corporate policy against providing services to companies engaged in mountain top removal.

Under the terms of your January 6, 2009, ethics agreement, you agreed that you would not participate personally and substantially in any particular matter that has a direct and predictable financial effect on your financial interests unless you first obtained a written waiver pursuant to 18 U.S.C. § 208(b)(1) or qualified for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2). To avoid potential conflicts of interest, you agreed to divest within ninety days of your confirmation of the Bank of America (B of A) stock that you and your husband own. You have not yet been able to meet this requirement, so have asked for specific advice from the Office of General Counsel (OGC) as to whether you may participate personally and substantially in certain coal mining issues.

To make this determination, OGC must first examine whether there is direct and predictable financial effect between your ownership interest and the particular matter in which you wish to participate. If there is a nexus, then OGC must examine whether any regulatory exemption level applies. Finally, OGC must consider whether any other ethics restrictions apply.

Financial Conflict of Interest

As a federal employee, you cannot participate personally and substantially in any particular matter that has a direct and predictable financial effect on your financial interests. 18 U.S.C. § 208. OGC, in consultation with the Office of Government Ethics (OGE), carefully considered whether there is a direct and predictable effect between an Agency decision on mountain top removal and your ownership interest in B of A, which is, among other things, a financial services company.

We considered that B of A financially supports alternatives to mountain top mining. In fact, it has made a corporate decision to "phase out financing of companies whose predominant method of extracting coal is through mountain top removal." As a result, B of A has taken steps to cease providing financial assurance to several of the top coal mining operations in the United States. Coal extractors that use mountain top removal must turn to other entities for financial services. We determined that a corporate policy to deny services to certain coal extractors but not others does not, in and of itself, constitute a direct and predictable financial effect. Therefore, you may participate in a particular matter involving mountain top removal because you are not personally invested in the discrete and identifiable class that is directly affected by any Agency decision, such as the coal mining companies themselves.

Regulatory Exemption

Please note that even if OGC had determined that there was a direct and predictable effect, and therefore a financial conflict of interest under 18 U.S.C. § 208, you nevertheless qualify for a regulatory exemption. At the time that you signed your ethics agreement, you reported that the total value of your B of A (and formerly Merrill Lynch) stock exceeded \$50,000. However, since that time, the market value of your stock has decreased significantly. The current value of your common stock is approximately \$8500, while the value of your preferred stock is approximately \$2700. The total value of your stock, as of March 4, 2009, is approximately \$11,200.

Given these values, you qualify for the *de minimis* exemption for participation in particular matters of general applicability. OGE's regulatory exemption at 5 C.F.R. § 2640.202(c) permits participation if your ownership interest is less than \$25,000 in any one entity, and less than \$50,000 in all affected entities. In fact, you also qualify for the *de minimis* exemption for participation in particular matters involving specific parties because your ownership interest is less than \$15,000. 5 C.F.R. § 2640.202(a).

Additional Ethics Determination

We note that B of A is your husband's employer and, as such, his salary from B of A is also imputed to you under 18 U.S.C. § 208. To determine whether his employment presents a disqualifying financial interest, OGC examined whether there is a close causal link between the particular matters involving coal mining in which you seek to participate and the real possibility of a gain or loss to the financial interest as a result of

your participation. OGC has determined that your participation in coal mining issues will not have any effect on the willingness or ability of B of A to pay your husband's salary nor to continue his employment. Therefore, we conclude that his employment with B of A does not preclude you from participating in coal mining issues.

Conclusion

You may participate personally and substantially in coal mining issues. I will put a copy of this determination in your file. Please contact me if you have any further questions.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB

5 2009

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination – Toxics Release Inventory (TRI) Burden
Reduction Rule Litigation

FROM: Patricia K. Hirsch *Patricia K. Hirsch*
Designated Agency Ethics Official
and Acting General Counsel

TO: Lisa P. Jackson
Administrator

You have asked if you can be permitted to participate in a specific party matter involving the State of New Jersey. We understand that the State of New Jersey has joined eleven other states in litigation related to the EPA's Toxics Release Inventory Burden Reduction Rule

As you know, you have a "covered relationship" with the State of New Jersey pursuant to 5 C.F.R. § 2635.502(b)(iv) and have agreed to take appropriate steps to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. Government-wide ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern that a reasonable person may question the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) the adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

With regard to this specific party matter, I have carefully considered the six factors that are listed in 5 C.F.R. § 2635.502(d). I have considered the fact that this particular matter involves not just the state of New Jersey but other states as well, and that it involves a nation-wide regulation that is not limited in application to New Jersey or any other single state.

After reviewing all the factors, I have concluded that the interest of the United States Government in your participation in this particular matter would outweigh any concerns about your impartiality. Given the numbers of parties participating in this matter and the national impact of the regulations at issue, I also conclude a reasonable person would have very little concern over the integrity of EPA actions in light of any prior involvement by you on behalf of New Jersey.

Therefore, you may participate in discussions and meetings related to this particular matter, even though the State of New Jersey is a named specific party. In accordance with your ethics agreement, we understand that you will not participate in any other particular matter that involves the State of New Jersey (or any other of your covered relationships) unless and until you first consult with the Office of General Counsel and obtain a written determination such as this one pursuant to 5 C.F.R. § 2635.502(d).

Please feel free to contact me or Justina Fugh, Senior Counsel for Ethics, if you have any further questions. I can be reached at hirsch.pat@epa.gov or (202) 564-5462; Justina can be reached at fugh.justina@epa.gov or at (202) 564-1786.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 4 2009

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination – NPDES Voluntary Permit Fee Incentive for
Clean Water Act Section 106 Grants

FROM: Patricia K. Hirsch *Patricia K. Hirsch*
Designated Agency Ethics Official
and Acting General Counsel

TO: Lisa P. Jackson
Administrator

You have asked if you can be permitted to participate in a specific party matter involving the State of New Jersey. We understand that the State of New Jersey has joined four other states in a specific party matter involving the EPA's Voluntary Permit Fee Incentive rule.

As you know, you have a "covered relationship" with the State of New Jersey pursuant to 5 C.F.R. § 2635.502(b)(iv) and have agreed to take appropriate steps to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. Government-wide ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern that a reasonable person may question the "integrity of the agency's programs and operations." 5 C.F.R. 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) the adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

With regard to this specific party matter, I have carefully considered the six factors that are listed in 5 C.F.R. § 2635.502(d). I have considered the fact that this particular matter involves not just the state of New Jersey but other states as well, and that it involves a nation-wide regulation that is not limited in application to New Jersey or any other single state.

After reviewing all the factors, I have concluded that the interest of the United States Government in your participation in this particular matter would outweigh any concerns about your impartiality. Given the numbers of parties participating in this matter and the national impact of the regulations at issue, I also conclude a reasonable person would have very little concern over the integrity of EPA actions in light of any prior involvement by you on behalf of New Jersey.

Therefore, you may participate in discussions and meetings related to this particular matter, even though the State of New Jersey is a named specific party. In accordance with your ethics agreement, we understand that you will not participate in any other particular matter that involves the State of New Jersey (or any other of your covered relationships) unless and until you first consult with the Office of General Counsel and obtain a written determination such as this one pursuant to 5 C.F.R. § 2635.502(d).

Please feel free to contact me or Justina Fugh, Senior Counsel for Ethics, if you have any further questions. I can be reached at hirsch.pat@epa.gov or (202) 564-5462; Justina can be reached at fugh.justina@epa.gov or at (202) 564-1786.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 09 2009

Ms. Lisa P. Jackson
EPA Administrator-Nominee
[FOIA ex(b)(6)]

OFFICE OF
GENERAL COUNSEL

Dear Ms. Jackson:

Should you be confirmed as EPA Administrator, you have asked if you would be permitted to participate in two specific party matters involving the State of New Jersey. Those two matters are *State of New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *rehearing denied* (May 14, 2008), (the "CAMR litigation"), and *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *rehearing granted in part* (Dec. 23, 2008), *rehearing en banc denied* (Dec. 23, 2008), (the "CAIR litigation"). Within the last year, prior to being nominated as the EPA Administrator, you served as the Chief of Staff to the Governor of New Jersey and as the Commissioner of the New Jersey Department of Environmental Protection. We understand that you may have participated personally and substantially in these two particular matters involving New Jersey as a specific party.

As you know, upon confirmation, you would have a "covered relationship" with the State of New Jersey pursuant to 5 C.F.R. § 2635.502(b)(iv) and would have to take appropriate steps to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. You do not have any significant financial interest in the State of New Jersey, so the Office of General Counsel has determined that you have no conflicting financial interest. What remains to be decided is whether your participation in these matters on behalf of EPA is permitted under the impartiality provisions of the Federal ethics regulations.

Government-wide ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern that a reasonable person may question the "integrity of the agency's programs and operations." 5 C.F.R. 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and

(6) the adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

With regard to the position of Administrator and any participation in the CAMR litigation and the CAIR litigation, we have carefully considered the six factors that are listed in 5 C.F.R. § 2635.502(d). In assessing impartiality concerns for your potential role as the Administrator at EPA, important considerations are that your prior employment was with a State, rather than a private entity, and that States share responsibility with EPA in protecting human health and the environment. In fact, with respect to many of our statutes, EPA has directly delegated regulatory and enforcement authority to states. That being said, we also appreciate that, in some situations, States are directly regulated by this Agency, and are at times opposing parties in litigation with the agency. We also recognize that, since you are not an attorney, there are no bar restrictions limiting your ability to participate on behalf of EPA after your prior involvement in these cases on behalf of New Jersey.

As we have already determined that you have no conflicting *financial* interest from your employment with New Jersey, we must look at the specific party matters themselves. The CAMR litigation was brought by a coalition of fourteen states, public interest groups, industry associations and the City of Baltimore. In addition, both sides inspired numerous parties to intervene in the litigation, including additional states, industry groups, public interest groups, the Maine tribes and the National Congress of Indians. The Washington Legal Foundation filed as *amicus curiae*. Similarly, in the CAIR litigation, petitioners included the State of North Carolina, numerous utilities, industry trade associations, and the City of Amarillo. Intervenors included utilities, environmental groups, and industry trade associations. New Jersey and four other states as well as the Tennessee Valley Authority filed as *amici curiae* supporting the request for review. Both of these lawsuits involved challenges to nation-wide regulations and were not limited in application to New Jersey or any other single state. Both the CAMR litigation and CAIR litigation drew national participation by multiple parties, and neither case depended solely on New Jersey's participation for their filing and prosecution through the appeals process.

After reviewing all the factors, we have concluded that the interest of the United States Government in your participation in *State of New Jersey v. EPA* and *North Carolina v. EPA* would outweigh any concerns about your impartiality. The appellate court has remanded the CAIR litigation to EPA for remedial action, and the CAMR litigation is still in the appellate process. The interests of the United States Government are significant and substantial in having the EPA Administrator able to participate in the ultimate resolution of these cases. Given the numbers of parties participating in both cases, and the national impact of the regulations at issue, we also conclude a reasonable person would have very little concern over the integrity of EPA actions in light of any prior involvement by you on behalf of New Jersey in the CAMR litigation and CAIR litigation.

Therefore, if confirmed as EPA Administrator, you would be permitted to participate in discussions and meetings related to the CAMR litigation and the CAIR litigation. Of course, in the interest of avoiding even the appearance of a potential conflict, you may also decide to forego participation as Administrator in these two particular matters. In accordance with your ethics agreement, we understand that you will not participate in any other particular matter that involves the State of New Jersey (or any other of your covered relationships) unless and until you first consult with the Office of General Counsel and obtain a written determination such as this one pursuant to 5 C.F.R. § 2635.502(d).

Please feel free to contact me or Justina Fugh, Senior Counsel for Ethics, if you have any further questions. I can be reached at hirsch.pat@epa.gov or (202) 564-5462; Justina can be reached at fugh.justina@epa.gov or at (202) 564-1786.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Patricia K. Hirsch", written in a cursive style.

Patricia K. Hirsch

Designated Agency Ethics Official